

Claimant, a machinist with respondent, alleged an injury to his back on or about June 28, 1993. Claimant originally alleged June 21, 1993, as the injury date, but a review of the evidence indicated claimant was inaccurate in his estimate of the calendar date of

the injury. Evidence does indicate claimant worked only 3.43 hours on June 28, 1993, going home after having worked less than half a day. Claimant advised his supervisor that he was hurting and wanted to go to a chiropractor. He was told by his supervisor to go home and that he needed a written release to return to work. This uncontradicted conversation with claimant's supervisor indicates respondent was notified of claimant's alleged injury. As respondent failed to file an accident report after having been notified of the injury, the written claim statutory limitation would be one year. See K.S.A. 44-557(c).

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. K.S.A. 44-501; K.S.A. 44-508(g); Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

Whether an accidental injury arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case. Messenger v. Sage Drilling Co., 9 Kan. App. 2d 435, 680 P.2d 556, rev. denied 235 Kan. 1042 (1984).

It is the function of the trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

The Appeals Board finds claimant suffered an accidental injury arising out of and in the course of his employment on June 28, 1993. The Board further finds claimant provided timely notice to the respondent within ten days of the June 28, 1993 injury and further that claimant filed written claim within one year of said date pursuant to K.S.A. 44-557.

K.S.A. 44-551(b) provides that the Appeals Board shall not review a pending preliminary hearing order entered by an Administrative Law Judge unless it is alleged the Administrative Law Judge exceeded his or her jurisdiction in granting or denying the relief requested.

K.S.A. 44-534a provides that the following disputed issues shall be considered jurisdictional and subject to the Appeals Board review from preliminary hearings:

- (1) Whether the employee suffered an accidental injury.
- (2) Whether the injury arose out of and in the course of the employee's employment.
- (3) Whether notice is given or claim timely made.
- (4) Whether certain defenses apply.

Having found claimant suffered accidental injury arising out of and in the course of his employment and further, having found both notice and written claim were timely made, the Appeals Board will not consider the issues of temporary total disability or on-going medical care. These issues are within the jurisdiction of the Administrative Law Judge and are not issues set forth in K.S.A. 44-534a over which the Appeals Board has jurisdiction from a preliminary hearing order.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Shannon S. Krysl dated September 20, 1994, is affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of February, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Paul Hogan, Attorney at Law, Wichita, KS
James A. Cline, Attorney at Law, Wichita, KS
Steven Foulston, Attorney at Law, Wichita, KS
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director